



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 7 OF 2017

STANBIC BANK KENYA LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

RICHARD KIPRUTO BUSIENEL.....DEFENDANT/APPLICANT

RULING

The applicant entered into a consent with the Respondent on 20th September 2017 to settle the outstanding loan amount of Kshs. 25,539,694.30 as follows:-

1. The Respondent was to pay the sum of Kshs. 15,000,000.00 on or before the 15th October 2017.

2. Further payments to be paid as follows:-

(a) Sum of KShs. 2,000,000.00 on or before 30th October, 2017.

(b) Sum of Kshs. 2,000,000.00 on or before 30th November, 2017.

(c) Sum of Kshs. 2,000,000.00 on or before 30th December, 2017.

(d) Sum of Kshs. 2,269,847.00 on or before 30th January 2018.

(e) Sum of KShs. 2,269,847.00 plus any additional interest accruals on account on or before 27th February 2018.

3. Respondent to pay agreed recovery costs of Kshs. 500,000.00.

4. In the event of default in the payment of the outstanding amount in its due date, the Respondent shall be at liberty to attach the securities the subject of the proceedings and or pursue any other legally acceptable mode of execution to recover the entire balance outstanding.

The applicant, following the said consent, paid Kshs. 15,000,000.00 on 30th December, 2017 of which was acknowledged by the respondent's advocates vide a letter dated 9th January 2018. Kshs. 278,082 was also debited to the applicant's account, by the Respondent, as part payment of the legal fees payable.

The warrant of attachment dated 3rd July 2018 is as follows:-

Decretal amount 13,634,893:28

Taxed costs 500,000.00

Less paid on account ... 250,000.00

Balance13,884,893:28

Interest on decretal amount1,772,536:00
Further costs450
Collection fees 1,500:00
TOTAL 15,659,379:28

Proclamation of attachment of movable property by Legacy Auctioneering Services includes:-

1. Tractor Registration No. KTCB 995J John D.
2. Tractor Registration No. KTCB 133N John D.
3. Household goods ie Fridge, Gas Cooker, T.V, DVD, Sofaset etc.
4. Trucks, Lorries, Tractors, Caterpillar, Tractors, Saloon Cars, Pick Up etc.

Following the foregoing, the applicant filed the application herein urging this court to:-

1. Stay the execution of the decree herein.
2. Declare the warrant of attachment irregular.
3. Allow the applicant to pay the decretal sum within 3 months of the date of this application.

The applicant's case is that the warrant of attachment should recover only what is due. The attachment and proclamation by the Respondent does not recognize the paid up principal amount. The Respondent was to attach properties named as securities in case of default in payment. Proclamation is beyond the securities mentioned which were only tractors. The interest should be at court rates. The applicant has shown good will by paying 15,000,000 of the decretal sum and is willing to pay the balance in three months. Carrying out execution will inconvenience him. The cost of 3,000,000 ought to be justified and the court has a duty to stop an irregular warrant of attachment.

The Respondents' case is that the application is contradictory as the applicant want Warrants of attachment declared irregular but also prays for three months to settle the decretal sum. They have not proved that the outstanding figure is overstated. If the applicant disputes part of the sum, he should deposit the disputed sum in court and pay the undisputed amount to the Respondent.

Issues for determination are:-

- (1) Whether the court can vary the term of the consent order and allow for payment of the outstanding amount in 3 months' time.
- (2) Whether the consent order was breached.
- (3) Whether the warrant of attachment are irregular
- (4) Whether the application for stay is merited.

On the first issue it is trite law that courts do not interfere with a consent judgment or order except in such circumstances as would afford a good ground for varying or rescinding a consent between the parties. The case of Brook Bond Liebig ltd –vs- Mallya (1975) EA 266 of 269 is to the point.

The consent order was explicit and under ground 4 states what was to happen in case of default or breach in payment as agreed upon. The applicant has not raised a good reason as to why the terms should be varied.

Was the consent breached?

The 5,000,000.00 was to be paid on or before 15th October, 2017. The applicant paid on 30th December 2017. Other payments towards settlement of the principal sum were not made subsequently as stipulated in the consent. Only part payment of costs was made of 250,000/- on 6th February 2018 and 278,082.88 in July 2017. The terms of consent were to see full settlement of the claim by 27th February 2018. This makes it clear that the applicant is in breach of the consent order.

For the Respondent, ground 4 of the consent states that:-

“In the event of default in the payment of the outstanding amount on its due date, the plaintiff shall be at liberty to attach the securities the subject of the proceedings and or pursue any other legally acceptable mode of execution to recover the entire balance outstanding.”

From my understanding, the Respondent could only attach the securities the subject of the proceedings. According to the plaint the subject of the proceedings are two tractors Registration No. KTCB 995 J and KTCB 113 N. The consent order allowed the Respondent only to attach these two to recover the amount owed. The other could be probably placement in Civil Jail. Proclamation of attachment by Legacy Auctioneering Services for more than the two said tractors is therefore in breach of the consent entered into by parties herein. To this extent the respondent is equally in breach of the consent order.

On whether the warrants of attachment are irregular, the principal sum owed was Kshs. 25,539,694.30. Kshs. 15,000,000.00 was paid which leaves a balance of Kshs. 10,539,694.3. Definitely there is the issue of cost and interest. What is proclaimed is Kshs. 15,659,379.28, Exclusive of Auctioneers fee of 1.4 Million. It is not clear how the amount of over 5 million is derived as costs and interest, more so given that part of the cost had been paid. Such should have been made clear. Lack of clear explanation raises suspicion that the respondent wishes recover more than what is due to it. This makes the attachment irregular.

Is the application merited?

Order 42 rule 6(2) of the Civil Procedure Rules 2010 states:-

(2) (a) No order for stay of execution shall be made under sub rule (1) unless –

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.

(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

The court has a duty to do justice at all times. The amount in issue is colossal, over Kshs. 10,000,000.00. A good part of it is undisputed, especially the sum clearly expressed in the consent.

What is in dispute is much less. In the application the applicant has made request to pay in three months' time. That was in July 2018. The period has long lapsed as we are now in 2019. He must have made plans of payment within the said promised period. There is therefore no reason as to why he should not pay the undisputed sum to the Respondent within one month of this ruling. The warrants should be corrected within 14 days thereafter for recovery of outstanding amount if any. The stay of execution is therefore granted, limited to the said period and on the said terms.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 28th day of March, 2019.

In the presence of:-

Manani for the defendant/Respondent

Mr. Mwelem - Court clerk

And in the absence of Plaintiff/Applicant